FILE COPY

No. 864.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

PETER PANNELL,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OCTOBER TERM, 1958

No. 364

PETER PANNELL,

Petitioner,

v.

UNITED STATES LINES COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

STATEMENT.

Petitioner sued in Admiralty to recover $7,788 for damage to a yacht carried by agreement on deck aboard the SS. *American Flyer* from London to New York. Respondent conceded liability for the damage prior to trial, but asserted its liability was limited to $500 under the terms of the bill of lading.

The Carriage of Goods by Sea Act expressly provides that the Act does not apply *ex proprio vigore* to this bill of lading contract, that is, the Act by its own terms does not apply to cargo which by the contract of carriage is stated as being carried on deck and is so carried. 46 U. S. C. sec. 1301(c). Nevertheless petitioner contended that the con-

struction of this bill of lading contract resulted in an incorporation of the Carriage of Goods by Sea Act and that such incorporation had the same effect as if the Act had applied to the bill of lading as a matter of law.

Respondent contended below:

1) The Act was not incorporated into this bill of lading which agreed to carriage on deck; and

2) even if it be assumed that the Act was incorporated, such incorporation merely had the effect of making the provisions of the Act terms of the bill of lading and under a proper construction of the contract as a whole respondent's liability was limited by Clause 23 of the bill of lading to $500.

In the bill of lading contract (Clause 23) the parties agreed that all pieces and articles of any description except goods shipped in bulk were to be considered "packages". Petitioner conceded at the trial that the yacht was not goods shipped in bulk. Moreover the petitioner did not declare a value higher than the $500 agreed on, which he was free to do.

The Court of Appeals for the Second Circuit, reversing the District Court and following earlier decisions of that Court including an opinion of Judge Learned Hand in *The Westmoreland* (2 Cir. 1936), 86 F. 2d 96, unanimously held at 263 F. 2d page 498:

> "Where a statute is incorporated by reference its provisions are merely terms of the contract evidenced by the bill of lading".

and decided that under the contract respondent's liability was limited to $500. We submit that the decision was correct.

Reasons for Denying the Writ.

I. The question said by petitioner to be presented assumes that Clause 2 of the bill of lading incorporates the Carriage of Goods by Sea Act. We submit and will hereinafter point out that such is not the case. Therefore, there is no such question presented as petitioner asserts.

II. There is not any question presented of concern or importance to the maritime industry. Even if one goes so far as to assume that the Act was incorporated, as petitioner suggests, the question could not arise if a minor change were made in the contract.

The addition of the following italicized words to Clause 2 of the bill of lading would eliminate petitioner's issue:

> "*Except with respect to goods stated herein as being carried on deck and so carried*, this bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States * * *"

A decision in petitioner's favor might well not have any future effect whatever, if such slight change were made by carriers in the contract. The question is of no importance.

III. If the Act was not incorporated, the suggested conflict between circuits would not exist so far as this case is concerned. If the Act was incorporated we submit petitioner is not justified in stating that this decision would be in direct conflict with three decisions of the Fifth Circuit and two of the Fourth Circuit.

It may be noted that this case differs from *American Export Lines, Inc.* v. *Gulf Italia Co.*, Docket No. 871, before

the Court on petition for writ of certiorari, inasmuch as in the American Export Lines' case the cargo was carried under deck and the Carriage of Goods by Sea Act applied there as a matter of law so the issue in that case is wholly different from the one here.

ARGUMENT.

A. Neither the Carriage of Goods by Sea Act nor its terms were incorporated in the bill of lading.

The question petitioner says is presented assumes the Carriage of Goods by Sea Act was incorporated in the bill of lading and that the Act is the prevailing law of the contract. That Act does not apply to on deck shipments, 46 U. S. C. §1301(c) and we submit neither the Carriage of Goods by Sea Act nor its terms were incorporated in the bill of lading.

The contract which was construed by the courts below is the respondent's regular printed form of bill of lading. In an under deck carriage Clause 13 of the bill of lading, which reads: "In respect of goods carried on deck, * * *", is obviously inapplicable. On the other hand, the so-called Clause Paramount (Clause 2), which states that the bill of lading is subject to the Act, is applicable to such under deck carriage. Where the Act is applicable as a matter of law, the Act provides that every bill of lading for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of the Act. 46 U. S. C. §1300. Indeed, Clause 2 of the regular printed form of bill of lading and on which petitioner relies, was inserted pursuant to and as required by the Act, which reads, in part, at 46 U. S. C. §1312, as follows:

> "*Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter . . ."

Clause 2 of the bill of lading does not make any reference whatsoever to on deck shipments as such shipments are specifically excluded from the Act. It cannot be, since the Act specifically excludes on deck shipments, that by compliance with the terms of the Act as to regular under deck shipments that the Act is made applicable to a contract for on deck cargo.

Moreover, Clause 13 of the bill of lading specifically deals with the carriage of goods on deck and provides that the custody and carriage of goods on deck shall be governed by the terms of the bill of lading. It is to be noted that this clause deals *only* with deck cargo and provides merely that the carrier shall have the *benefit* (if it so seeks) of the rights, immunities, exceptions and limitations contained in the Act. It does not purport to incorporate the Act as a whole, nor all of its terms.

Under these circumstances, we think it is clear that this bill of lading, being a contract for the carriage of on-deck cargo, does not incorporate the Act. Obviously, it could not have been so intended. Just as Clause 13 (on-deck clause) is not operative with relation to under deck cargo and *is* operative as to on-deck carriage such as that before the Court, Clause 2 (Clause Paramount) is inoperative to on-deck carriage and is applicable as to regular under deck shipments.

B. PETITIONER'S CLAIM OF DIRECT CONFLICT BETWEEN CIRCUITS IS UNWARRANTED.

In the cases cited by petitioner, the Harter Act or statute in question was clearly incorporated in the contract of carriage. Here we submit the Act was not incorporated so there cannot be a conflict. Moreover, we are dealing with different contracts.

However, assuming the Act was incorporated, we consider that petitioner's statement that the decision in the Court of Appeals in this case "is directly in conflict with" three decisions of the Courts of Appeals for the Fifth Circuit and two decisions of the Fourth Circuit is unwarranted.

While some of those cases seem to consider or may in effect hold that the incorporation of a statute in a contract of carriage has the same effect as if the statute applied as a matter of law, it seems that those Courts, after considering all the provisions of the Act incorporated, may well have dealt with the matter primarily as one of construction of a contract. Indeed, Judge Hand in *The Westmoreland, supra,* referring to the cases of *Atlantic Gulf & West Indies SS Lines* v. *Interocean Oil Co.*, (4 Cir. 1929) 31 F. (2d) 1006 and *The Framlington Court,* (5 Cir. 1934) 69 F. (2d) 300, said:

> "* * * So far as the two decisions cited must be construed to deny an unconditional reading of the typed clause we cannot therefore go along, * * *"

The case of *The Zesta* (5 Cir. 1954), 212 F. (2d) 137, one of the three decisions in the Fifth Circuit cited by petitioner is clearly not in point.

On the other hand the opinion of Judge Learned Hand in *The Westmoreland, supra,* does discuss this question at

length. See also: *The Tregenna* (2 Cir. 1941), 121 F. (2d) 940; *Federal Ins. Co.* v. *American Export Lines, Inc.* (S. D. N. Y. 1953), 113 F. Supp. 540, 542; *In re Petterson Lighterage & Towing Corp.* (S. D. N. Y. 1957), 154 F. Supp. 461, 467.

We submit that the holding that the incorporation of such a statute as the Carriage of Goods by Sea Act or the Harter Act in a contract of carriage has the effect of only making the provisions of the Act terms of the contract of carriage, is unquestionably correct.

Petitioner has cited a number of other cases in his petition which we think do not need comment by us. Petitioner also suggests that the holding of the Court below on a rule of contract construction concerning "ambiguities" in a contract is contrary to various other decisions. This is clearly erroneous as the decisions cited by petitioner deal with one principle of contract construction while the Court below dealt with another principle of contract construction. There is no conflict inasmuch as the judges below found no "ambiguities". Indeed, petitioner's second argument would concede that the issue before the Court is what is the proper interpretation or construction of a simple bill of lading contract.

Conclusion.

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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May 18, 1959.